UNITED STATES
v.
J. L. NOSS AND MARY F. NOSS

IBLA 80-206 Decided May 12, 1981

Appeal from a decision of Administrative Law Judge Dean F. Ratzman declaring lode mining claims null and void. CA-5748.

Affirmed.

1. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case, the burden then shifts to the claimant to overcome that showing by a preponderance of the evidence.

2. Administrative Procedure: Burden of Proof--Mining Claims: Discovery: Generally

Where a Government mineral examiner testifies that he has examined a claim and found the mineral value insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

3. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a prudent person would be justified in the further expenditure of

his labor and means, with a reasonable prospect of success in developing a valuable mine.

4. Evidence: Generally--Hearings--Mining Claims: Hearings

Evidence submitted on appeal after an initial decision in a mining contest may not be relied upon in making a final decision but may only be considered to determine if there should be a further hearing.

5. Mining Claims: Contests

Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's workings. It is incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where he does not, he assumes the risk that the mineral examiner will not be able to verify the discovery of the alleged mineral deposit, and his unsupported argument that the samples taken by the examiner are not representative will be rejected.

APPEARANCES: J. L. Noss, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is from the November 26, 1979, decision by Administrative Law Judge Dean F. Ratzman, which declared appellants' New York and New York Extension quartz lode mining claims null and void. These two unpatented mining claims were located in 1920 in the NW 1/4 sec. 2, T. 17 N., R. 11 E., Mount Diablo meridian, Nevada County, California, and quitclaimed to appellants in 1959. The Bureau of Land Management on behalf of the U.S. Forest Service initiated contest proceedings charging, inter alia, that the claims were invalid for lack of discovery of a valuable mineral deposit.

A hearing on the contest was held in Sacramento, California, on October 3, 1979, before Judge Ratzman. In his decision, Judge Ratzman described the testimony and evidence presented at the hearing, summarized the applicable law and ruled that the United States had presented a prima facie case of no discovery. The Judge then held that appellants had not overcome the prima facie case by a preponderance of the evidence

and declared the mining claims null and void. The Judge's findings and conclusions incorporate the following principles of mining law.

[1] When the United States contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has assumed only the burden of going forward with sufficient evidence to establish a prima facie case of no discovery; the burden then shifts to the contestee to refute, by a preponderance of the evidence, the Government's case. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, 423 U.S. 829, rehearing denied, 423 U.S. 1008 (1976); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

[2] The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit. United States v. Taylor, 25 IBLA 21 (1976).

[3] The discovery of a valuable mineral deposit within the limits of a mining claim is the sine qua non for a valid location. 30 U.S.C. §§ 23, 35 (1970). A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455 (1894); United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). This test, known as the "prudent man test" has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called "marketability test." United States v. Coleman, supra; Converse v. Udall, supra.

On appeal, appellants have presented six assay reports. They allege that Paul Eastham, one of their miners, could not locate four of these reports at the time of the hearing (Tr. 55). Two of the reports were compiled after the hearing, in November and December 1979. The reports show concentrations of gold varying from .05 ounce per ton to .54 ounce per ton and values ranging from $7 to $58 per ton. The reports also show concentrations of silver of .03 ounce per ton to .15 ounce per ton. The reports bear the names of Paul Eastham, J. L. Noss, or Mountain view Mining, but do not indicate the size or source of the samples, although appellants state that the misplaced assays relate to the New York North Extension claim. Appellants contend that these reports are indicative of a valuable mineral deposit. They argue that the sample taken by the Government's mineral examiner was actually "mine waste" which accounts for its low assay value of $9 per ton. Appellants conclude that if the waste showed an assay value of $9 per ton, then the milled ore must have been much more valuable.

[4] Appellants' assay reports are additional evidence newly tendered on appeal. As such, they can be considered only to determine if a further hearing is warranted. United States v. Rosenkranz, 46 IBLA 109 (1980); United States v. Taylor, supra. In order to warrant the ordering of a new hearing there should be reasons given to show that there is a substantially equitable basis for holding the new hearing, and also there should be a substantial expectation that the new hearing would be productive of more conclusive evidence on the issues. Appellant has not requested a new hearing, and we are not persuaded that a sufficient equitable basis exist to warrant one in this matter. A brief reference to assays that appellants had but could not locate was made by their geologist, Mr. Davis. However, Mr. Davis also testified that they (appellants) had some assays at the cabin that were along the same line as those presented by the Government (Tr. 55). Appellants offer no explanation why the available assays were not introduced at the hearing. There is no justification to order a further hearing.

[5] Appellants' argument concerning the Government's sampling of inferior grade ore is on no firmer basis. It is the duty of the mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim, nor do they have to go beyond examining the discovery points of the claimant. The function of the Government's mineral examiners is to examine the discovery points made available by the claimant and to verify, if possible, the claimed discovery. United States v. Brunskill, 51 IBLA 199 (1980); United States v. Bryce, 13 IBLA 340 (1973). Where a claimant fails to keep his discovery points open and safely available for sampling by the Government's examiner, or declines to accompany the examiner to the claim, he assumes the risk that the Government examiner will be unable to verify the alleged discovery of a valuable mineral deposit. United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, 25 IBLA 77 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Bruce R. Harris
Administrative Judge